FILE COPY

FILED
DEC 7 1936
CHARLES ELMORE CROPL
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 436

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,

IRVING TRUST COMPANY, as Trustee, UNITED CIGAR STORES COMPANY OF AMERICA, LANDLORDS' PROTECTIVE COMMITTEE, PREFERRED STOCKHOLDERS' PROTECTIVE COMMITTEE, DEBENTUREHOLDERS' PROTECTIVE COMMITTEE, JACOB RUPPERT REALTY CORPORATION and UNITED STORES CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONERS

SUSAN BRANDEIS,
Counsel for Petitioners.

MURRAY C. BERNAYS,
GILBERT, DIAMOND & BRANDEIS,
Of Counsel.

THE COURT PRESS, N. Y. C.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Statement of the Case	2
Facts	2
Rulings of the Courts Below	7
Questions Presented	8
Statutes Involved	9
Specification of Errors	9
Summary of Argument:	9
POINT I—Under Section 77B, future lease liabilities are terminated through rejection and landlords are given as compensation therefor a claim against the debtor's estate, independent of the effect of the termination under the substantive law of landlord and tenant	10
The effect of Section 77B is to permit termination of burdensome leases and to give landlords provable claims in bankruptcy whether or not under applicable state law they would have presently ascertainable claims	13
Section 77B accords a landlord whose unexpired lease was rejected in the prior bankruptcy proceeding identical treatment with a landlord whose lease was rejected in 77B	14
The detailed provisions of Section 77B respecting landlords' claims plainly make claims under leases a new kind of bankruptcy claim	16
Re-entry or surrender after rejection does not bar a landlord's claim for future rent	18
POINT II—The qualification riders attached to the assignment agreements reserved the petitioners' claims herein, even if those agreements be construed as surrenders	22
Conclusion	33
Appendix A—(Legislative History of Section 77B)	i
Appendix B—(Statutes Involved)	i

CITATIONS

PAGE

Cases:

Associated Gas & Electric Co., In re, 11 Fed. Supp. 359..... 27

Campbell v. Alleghany Corp., 75 Fed. (2d) 947..... 27
Commonwealth Bond Corporation, In re, 77 Fed. (2d) 308..... 26n

Duparquet Co. v. Evans, 297 U. S. 218.....In Appendix A
Dushane v. Beall, 161 U. S. 513, 515-516..... 13

Frazin, In re, 183 Fed. 28, 32.....11n, 13

Gray v. Kaufman Dairy & I. C. Co., 162 N. Y. 388, 83 Fed. (2d) 19n

Hermitage v. Levine, 248 N. Y. 333..... 14n

Island Park Associates, In re, 77 Fed. (2d) 334..... 26n

Manhattan Properties, Inc. v. Irving Trust Company, 291 U. S. 320 .....18n, 29
Menzies, In re, 60 Fed. (2d) 1064, 1067..... 25
Metropolitan Life Ins. Co. v. Hellinger, 272 N. Y. 24..... 22n
Meyer v. Kenmore Hotel Co., 297 U. S. 160, 165..... 26

Northern Pacific Railway Co. v. Boyd, 228 U. S. 482.....14, 14n

Paramount Publix Corp., In re (*Madison-Toledo Co. v. Paramount Pictures, Inc.*), 85 Fed. (2d) 83..... 18n

Rauch, In re, 226 Fed. 982, 984, aff'd. *sub nom Lott v. Salsbury*, 237 Fed. 191..... 25
Roth v. Appel, In re, 181 Fed. 667..... 29

United Cigar Stores Company of America, In re (Kuehner-Fischer, Appellants), 85 Fed. (2d) 35..... 14n

Vitagraph, Inc. v. St. Louis Properties Corp., 77 Fed. (2d) 590, 592-593 27

STATUTES, LEGISLATIVE BILLS, AND LAW REVIEW:

76 Cong. Rec. 1360..... 15n
73 Cong. 1-2 Sess. Misc. 193..... 15n
Bankruptcy Act, §63(a), 48 Stat. 923.....12, 16
Bankruptcy Act, §77B, 48 Stat. 912.....cited throughout
32 and 33 Vict., c. 71..... 18n
46 and 47 Vict., c. 52..... 18n
4 and 5 Geo. V., c. 59..... 18n
H. R. 5884, 73 Cong. 1 Sess..... 20
8 American Bankruptcy Review..... i
9 American Bankruptcy Review..... ii
19 Va. Law Review..... ii
42 Yale L. J..... ii

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 436

In the Matter

of

UNITED CIGAR STORES COMPANY OF AMERICA,
Debtor.

JOSEPH E. OTIS ESTATE LAND TRUST, *et al.*,
Petitioners,

IRVING TRUST COMPANY, as Trustee, UNITED CIGAR STORES COMPANY OF AMERICA, LANDLORDS' PROTECTIVE COMMITTEE, PREFERRED STOCKHOLDERS' PROTECTIVE COMMITTEE, DEBENTUREHOLDERS' PROTECTIVE COMMITTEE, JACOB RUPPERT REALTY CORPORATION and UNITED STORES CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinions below officially reported are those of the Circuit Court of Appeals for the Second Circuit at 83 Fed. (2d) 202, and on rehearing 85 Fed. (2d)

Italics throughout supplied unless otherwise indicated.

11. The report of the Special Master (affirmed by the District Court without opinion, R. 337) appears in the Record at pages 324 *et seq.*

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The order for mandate of the Circuit Court of Appeals was entered April 13, 1936 (R. 379). The petitioners' petitions for rehearing were denied by the Circuit Court of Appeals by an order dated July 6, 1936 (R. 397). The petition for certiorari was filed October 5, 1936 and granted November 16, 1936.

STATEMENT OF THE CASE.

FACTS.

On August 29, 1932, United Cigar Stores Company of America, the debtor herein, filed a voluntary petition in bankruptcy and was duly adjudicated a bankrupt. The nine petitioners herein* were at that time landlords of United Cigar Stores under nine separate leases of real property, all of which were then in effect.

To enable it to deal expeditiously with some one thousand leases of real estate (R. 262), the trustee-in-bankruptcy sent circular letters to the landlords suggesting that agreements (varying slightly, to meet different situations) be entered into between the trus-

* Abe Schwartz and Myrtle Schwartz (R. 58-79); William E. Munk *et al.* (R. 80-100); Simon Lorch (R. 100-169); Louise S. Whitcomb *et al.* (R. 232-243); Fred O. Excell *et al.* (R. 244-255); J. E. Nunn (R. 169-182); Herbert Livingston *et al.* (R. 182-192); Thos. H. Brown *et al.* (R. 193-221); J. A. Rubel *et al.* (R. 222-231).

tee-in-bankruptcy, the bankrupt and the landlords (Trustee's Exhibit C, D and E (R. 9-16)). The trustee, in its letters pointed out that its rejection did not clear the landlord's title to his property, because the bankrupt's interest in both the lease and subleases remained. Attention was also called to the fact that questions remained concerning the rights of landlords to subleases made by the bankrupt, and to subrents collected since the bankruptcy, and concerning use and occupation claims against the trustee, all of which it was proposed should be taken care of by the proposed agreement.

To carry out the suggestions contained in the letters, the bankruptcy trustee prepared six printed forms of agreements to fit the various landlord situations (Claimant's Exhibits 1-6; R. 26-57).

The agreements were briefly described in the majority opinion below (83 Fed. (2d) 204). The only ones involved here are the so-called blue and white forms used in combination to cover one situation, and the green form. The blue and green forms were substantially identical.

As described in the opinion below (83 Fed. (2d) 204), the blue and white forms "were for use together in cases where the bankrupt both occupied part and sublet part and the trustee wished to continue the store." The white "form contained a use and occupancy agreement." The blue form "provided for the assignment by the trustee and the bankrupt of all their interest in the main lease except as it covered the store the bankrupt had used and in the subleases and in all of the rents accrued and to accrue under the subleases; the lessor assumed all the obligations of the trustee and the bankrupt under the lease and subleases, agreed to hold them harmless from any liability thereunder, and gave them and the bankrupt

estate a release similar to those already mentioned except as to that portion of the premises used as a store by the trustee and covered by the above-noted use and occupancy agreement."

The green form "was for use where the bankrupt had leased premises on which it had operated no store but had sublet the property. That provided for the assignment by the trustee and the bankrupt to the lessor of all their interest in the lease and subleases and to rents accrued and to accrue under the subleases, for a release to them and the bankrupt estate from the lessor similar to those already mentioned, and for the assumption by the lessor of all their obligations under the lease and the subleases."

Annexed to each agreement was a schedule of the subleases assigned.

The nine petitioners here refused to sign the agreements in the printed form presented by the trustee, although numerous other landlords did sign them. Accordingly a form of rider was proposed by the trustee. These riders, in the form in which they were finally included in seven of the agreements herein, provided:[a]

THE TYPICAL QUALIFICATION.

> "Nothing in this Article 5 shall be deemed a waiver by the Landlord of the right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or to relieve the Landlord from

[a] Excell (R. 252), Munk (R. 86), Lorch, (R. 152), Whitcomb (R. 238), Schwartz (R. 76), Brown (R. 215), Nunn (R. 179).

the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance."

In two of the agreements the form of rider was different.

THE RUBEL QUALIFICATION (R. 228).

"It is understood and agreed, however, that nothing in Article 5 of this agreement, or in any other portion of this agreement, shall be deemed a waiver by the landlord to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled."

THE LIVINGSTON QUALIFICATION (R. 189).

"It is, however, expressly understood and agreed that the said Landlord does not waive any right to prove against the Bankrupt Estate any provable claims to which the Bankruptcy Court may adjudge the Landlord is entitled, but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the Landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the Trustee from contesting such proof or allowance. All such provable claims shall not be affected by this agreement."

In the course of negotiation of these qualification riders, in one case the meaning of the typical form was the subject of discussion between the attorney and field representative of the trustee and the attorney for the claimant. The latter insisted that he wanted to "reserve the right to file any claim which might arise depending on future circumstances." Thereupon the typical form of rider was agreed upon.[b]

[b] Lorch (R. 307).

With the respective typewritten riders attached, all nine of the landlord petitioners signed agreements with the trustee between October 19, 1932 and December 3, 1932.[c] In five cases[d] the trustee sent notices of rejection to the landlords before the agreements were made. By January 1, 1933 the trustee had in all cases surrendered the respective premises and the landlords had reentered.[e] In the claim of Brown (R. 212 *et seq.*) the assignment of leases and subleases was made to a nominee. In the other eight cases, the assignments were made to the landlords but in the Lorch case there was express proviso made by an additional rider, that the assignment agreements would not "operate as a merger of said leases with the interest of the landlord as a fee owner of said premises" (R. 153).

On June 9, 1934, immediately after the effective date of Section 77B, while the bankruptcy proceeding of the debtor was still pending, the debtor filed its petition under Section 77B in such bankruptcy proceeding, as permitted by the statute.

The petitioners in due course filed proofs of claim

---

[c] Excell, November 29, 1932 (R. 248); Munk, November 29, 1932 (R. 83); Lorch, October 19, 1932 (R. 149); Whitcomb, December 3, 1932 (R. 235); Schwartz, November 14, 1932 (R. 73); Rubel, October 22, 1932 (R. 225); Brown, November 28, 1932 (R. 212); Livingston, November 30, 1932 (R. 186); Nunn, November 22, 1932 (R. 176).

[d] Excell, November 25, 1932 (R. 249); Munk, November 21, 1932 (R. 84); Whitcomb, November 21, 1932 (R. 236); Brown, November 3, 1932 (R. 193); Livingston, December 3, 1932 (R. 182).

[e] Excell, surrender December 31, 1932, re-entry January 1, 1933 (R. 244); Munk, surrender November 18, 1932, re-entry December 1, 1932 (R. 80); Whitcomb, surrender August 31, 1932, re-entry September 1, 1932 (R. 232); Brown, surrender November 10, 1932 (R. 193); Livingston, surrender December 3, 1932, re-entry December 3, 1932 (R. 182); Lorch, surrender August 31, 1932, re-entry August 31, 1932 (R. 100); Schwartz, surrender August 31, 1932, re-entry September 1, 1932 (R. 59); Rubel, surrender August 31, 1932, re-entry August 31, 1932 (R. 222); Nunn, surrender September 1, 1932 (R. 170).

for injury resulting from the rejection of their leases. Irving Trust Company, which had been continued in the 77B proceedings as trustee objected to the claims on the ground that they were barred by the assignment agreements.

RULINGS OF THE COURTS BELOW.

The Special Master recommended that the claims be disallowed (R. 324 *et seq.*), on the ground that the agreements cut off petitioners' rights to claims. He conceded that claims for future rent were intended to be preserved in the qualification riders but held that they were limited to provability resulting from a ruling by this Court that such claims were provable but did not include them if they should be made provable by legislative enactment (R. 330, 332). The Master's report was confirmed by the District Court without opinion (R. 337).

The Circuit Court of Appeals, by a divided court, sustained the conclusion of the Special Master on different grounds. The majority held that the agreements constituted surrenders, terminating all lease rights, and, in effect, that no landlord claim was provable in 77B unless it was a continuing claim against the debtor recognized by "the substantive law of landlord and tenant", *i. e.*, the applicable State law. The riders were held to be qualifications of the release clauses only. Since, under the Court's interpretation there were no rights surviving the agreements to be caught by the releases, the riders were of no effect. Judge Hand, dissenting, likewise held that the agreements operated as surrenders but disagreed with the opinion of his brothers that the qualifications "did not 'limit in any way the effect of the agreements for lease modifications'." In his opinion the qualifications showed the intention to reserve

future rent claims. He also disagreed with the Special Master's conclusion that they preserved claims made provable by judicial decision but not by legislative sanction.

On petition for rehearing (R. 380 *et seq.*,), it was pointed out to the majority of the Court of Appeals (1) that in two of the claims, Rubel and Livingston, the riders (quoted *supra*) were by their express terms not limited to the release clause but went to the whole agreements; (2) that in one case (claim of Lorch) there was express provision against merger; (3) that in one case (claim of Brown), assignment of leases had been made to a third party which prevented merger and hence surrender. The majority agreed that the Rubel and Livingston riders took them out of the scope of their prior ruling but held, with the Special Master, that the qualification riders were limited to provability of future rent claims brought about by judicial decision and did not include provability by legislative enactment. The majority therefore adhered to its prior disposition of these claims.

QUESTIONS PRESENTED.

(1) Were the petitioners persons "injured by * * * rejection" of their leases "in a proceeding pending prior to the institution of" this 77B proceeding and have they claims "for injury resulting from the rejection," within the meaning of Section 77B of the Bankruptcy Act and are the petitioners' claims, accordingly, provable herein, irrespective of whether or not there was a surrender after rejection.

(2) Do the typewritten qualification riders attached to the agreements, reserve claims with respect to future rent, provable in these 77B proceedings, irrespective of whether or not those agreements oper-

ated as surrenders and irrespective of the language of release contained in those agreements.

STATUTES INVOLVED.

The relevant parts of statutes having an important bearing on the case are set out in Appendix B annexed to this brief.

SPECIFICATION OF ERRORS.

The Court of Appeals erred:

(1) In holding that petitioners' claims were properly disallowed because the debtor's liability had been terminated by surrender before the initiation of the 77B proceedings herein.

(2) In holding that the riders, attached to the agreements entered into between petitioners, the bankrupt-debtor and the trustee-in-bankruptcy in the prior bankruptcy proceeding, did not reserve claims with respect to rent, provable in the subsequent 77B proceeding.

(3) In failing to hold that Section 77B conferred a new kind of claim in bankruptcy upon rejection of a lease in a prior bankruptcy proceeding, which is provable in a subsequent 77B proceeding despite intervening surrender.

(4) In failing to reverse the District Court.

SUMMARY OF ARGUMENT.

The petitioners' claims are allowable, whether or not under the applicable State law the lease was terminated by surrender under agreements in the prior

bankruptcy proceeding, in which the present 77B proceedings were taken. The language and purposes of Section 77B make it clear that Congress intended to grant claims to all landlords whose leases were rejected, irrespective of whether or not the lease term was surrendered after rejection, or whether or not lease liability survived under covenants of the lease, or whether or not that rejection occurred in the 77B proceeding or during the pendency of a prior bankruptcy. Section 77B creates a new kind of claim in bankruptcy, dependent on rejection and different from those dependent on the State law of landlord and tenant, based on continuing liability.

In any event, agreements between petitioners, the bankrupt-debtor and the trustee-in-bankruptcy contain riders which reserved out from the agreements, petitioners' rights to provable claims. The language of those riders applies equally to claims under 77B, as to claims under the Bankruptcy Act as it existed before the passage of 77B. Those reserved rights, included claims with respect to future rent and are not limited to future rent claims held provable by judicial decision under pre-existing law, but include such claims made provable by subsequent legislation, to wit, Section 77B.

POINT I.

Under Section 77B, future lease liabilities are terminated through rejection and landlords are given as compensation therefor a claim against the debtor's estate, independent of the effect of the termination under the substantive law of landlord and tenant.

The Circuit Court of Appeals held that the assignment agreements between the landlords-petitioners herein, the tenant-bankrupt, and the trustee-in-

bankruptcy, entered into during the pendency of the original bankruptcy proceedings and after the rejection of the leases by such trustee, constituted surrenders which "ended the liability of the lessee for future rent under the leases". The majority of the Court (Judge A. N. Hand dissenting), held that consequently your petitioners, even though their agreements were qualified, had no claims in this 77B proing, which was "taken in" the bankruptcy proceeding.[1]

The Court did not recognize that under Section 77B, the claim of a landlord depends simply upon the rejection of a subsisting lease, whether such rejection occurred in a 77B proceeding *or* in a prior bankruptcy proceeding. Here the leases were in full force and effect at the time of the rejection. The assignment agreements were not executed until an appreciably later date.

The *ratio decidendi* below was that since the leases were terminated by said agreements before these proceedings were instituted or Section 77B passed, and the leased real estate was surrendered to and accepted by the landlords "without any reservation", *no* future rent claims survived to be either barred or saved by the qualified release provisions of the agreements, which were thus totally ineffectual as to the claims here involved.[2] The Court said:

"The issue here is not one of the provability of

[1] A trustee in bankruptcy does not in fact "reject", but merely fails to adopt a lease (*In re Frazin*, 183 Fed. 28, 32). Although there was a formal notice of disaffirmance in five claims herein before the assignment agreements were entered into (R. 321), the failure of the trustee to adopt any of the leases constituted a rejection in fact and law in all nine cases.

[2] Upon petition for rehearing the Court placed its decision in two of the cases upon different grounds which are discussed in Point II of this brief.

actual claims for future rent, but rather one of recognition that the claimants have no claims at all against the debtor or its estate" (83 Fed. (2d) 202, 206).

The error of the majority of the Court was its failure to realize that Section 77B gave to landlords of debtors in 77B proceedings a claim not previously recognized in bankruptcy, *different from* a "claim against a debtor which the substantive law of landlord and tenant recognizes as an enforceable claim" (83 Fed. (2d) 202, 206). The effect of the section is that the tenant's continuing liability, whether (1) for rent under an unexpired lease of real estate or (2) for damages or indemnity under a covenant contained in such lease, may be terminated in 77B proceedings (subdiv. (b)(6), (c)(5)), and that the landlord shall have *in lieu thereof,* "a claim ranking on a parity with debts which would be provable under Section 63(a)" of the Act (subdiv. (b)(10)).

The decision of the majority of the Court is based on the assumption that lease obligation had to exist at the time "these proceedings were instituted" (83 Fed. (2d) 202, 206). But 77B expressly provides to the contrary. It gives a claim not only where "* * * an * * * unexpired lease of real estate shall be rejected * * * in a proceeding instituted under this section" but also where such a lease "*shall have been rejected by a trustee or receiver in bankruptcy* * * * *in a proceeding pending prior to the institution of a proceeding under this section* * * *" (subdiv. (b)(10)). All that is necessary for a landlord's claim is *the existence of a continuing lease liability at the time of rejection,* whether the rejection occurred in a 77B proceeding or "*in a proceeding pending prior*

to the institution of a proceeding" under Section 77B.[2a]

The claims now asserted by your petitioners arose out of rejection in the prior proceedings and are, accordingly, squarely within the terms of the statute.

THE EFFECT OF SECTION 77B IS TO PERMIT TERMINATION OF BURDENSOME LEASES AND TO GIVE LANDLORDS PROVABLE CLAIMS IN BANKRUPTCY, WHETHER OR NOT UNDER APPLICABLE STATE LAW THEY WOULD HAVE PRESENTLY ASCERTAINABLE CLAIMS.

Prior to the enactment of Section 77B, a corporate tenant desiring to reorganize, could not rid itself of lease-liabilities in bankruptcy. Rejection of the lease was merely the bankruptcy-trustee's refusal to assume, on behalf of the bankrupt estate, a burdensome asset. (*In re Frazin, supra.* See *Dushane* v. *Beall*, 161 U. S. 513 at 515-516.) Such rejection did not affect the bankrupt-tenants' obligations for future rent or for damages or indemnity, as the case might be, which continued as before.

Section 77B aimed at reorganization rather than liquidation and hence it was necessary to empower the trustee to terminate continuing lease-liabilities of the debtor-tenant. "Rejection" under 77B, therefore, is no longer a mere disclaimer but a means of effective termination of the obligations of the debtor-tenant, paving the way for reorganization.

[2a] The foregoing is reinforced by the provisions of Section 77B(p) which reads:

> "*This section* shall take effect and be in force from and after the date of the approval of this amendatory Act and *shall apply* as fully *to debtors,* their stockholders *and creditors, whose interests or debts have been acquired* or incurred *prior to such date,* as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act."

As a necessary corollary, landlords had to be compensated for termination of such obligations. Termination without compensation would violate due process. Further, permitting stockholders to participate in reorganizations without compensation for creditors would have violated the principle of the *Boyd* case.[3] In addition, Section 77B had to cover, not only leases containing covenants in a form under which the applicable landlord and tenant law recognized presently ascertainable damages or indemnity, but also leases which contained no covenants, or in which the covenant was in such form that such applicable law recognized no damages until an ~~impossibility~~ remote period.[4] In consequence Section 77B, besides recognizing presently measurable claims if they exist, created a new kind of bankruptcy claim, discussed in more detail, *infra,* to cover situations in which applicable landlord and tenant law recognized no corresponding claim.

SECTION 77B ACCORDS A LANDLORD WHOSE UNEXPIRED LEASE WAS REJECTED IN THE PRIOR BANKRUPTCY PROCEEDING IDENTICAL TREATMENT WITH A LANDLORD WHOSE LEASE WAS REJECTED IN 77B.

Congress was well aware that chain store and other corporations were endeavoring in large numbers to rid themselves of lease burdens under the bankruptcy law as it existed before the passage of Section 77B. That pre-existing law afforded no relief to the hapless

---

[3] *Northern Pacific Railway Co.* v. *Boyd*, 228 U. S. 482.

[4] In the companion case of *In re United Cigar Stores Company of America* (Kuehner-Fischer, Appellants), 85 Fed. (2d) 35 submitted herewith, the same Court which passed upon this case applied the statute in a manner contrary to its application here. It held provable the claim of a landlord under a rejected lease containing a covenant of indemnity in such form that under the State Law damages could not have been liquidated until the end of the term. (*Hermitage* v. *Levine*, 248 N. Y. 333.)

landlords of corporations.[5] The reason for the retrospective provision and its intent are therefore evident. Indeed, the provision for landlords' claims "in case * * * an unexpired lease shall have been rejected * * * in a proceeding pending prior" to a 77B proceeding, must have been particularly intended to apply to landlords of corporations in bankruptcy at the time 77B was passed. After 77B became law, proceedings

---

[5] Congressman Celler, 76 Cong. Rec. part 2, page 1360, stated:

> "Mr. Celler: Mr. Speaker, I have introduced a bill to amend the Bankruptcy Act *to prevent the recurrence of such scandals as grew out of the United Cigar Stores bankruptcy.*
>
> "* * * Under the present law, * * * the rent survives the bankruptcy and accrues for the term of the lease subsequent to the bankruptcy * * * In the case of a corporation the landlord has an empty right because a reorganization is effected in the name of the new corporation. This procedure was followed in the case of the United Cigar Stores bankruptcy * * * An individual * * * cannot by such subterfuge disavow his obligation * * *
>
> "The Bankruptcy Law was never intended to allow these large corporations in this slick manner to get out of their leases. It is interesting to note in this connection that the Irving Trust Company of New York City * * * has been aiding and abetting most of these schemes. * * * In the United Cigar Stores bankruptcy, the Irving Trust Company countenanced this enforced cancellation in the case of 860 leases. * * *
>
> "Under the proposed amendment the unexpired terms of the leases would be capitalized and would be a provable debt against the estate and the discharge in bankruptcy would relieve both the corporation and the individual * * *"

Mr. McKeown stated (*United States Judicial Committee (House) Hearings;* 73 Cong. 1-2 ses. Mis. p. 193):

> "That attempts to bring in and provides for the approval and settlement of claims that otherwise would not be liquidated claims. For instance take one of these cigar store chains and it has a 99 year lease on some nice corner piece of property, and that lease is unexpired. The way they get out of that at present is they go into bankruptcy and discharge that lease, under this; the fellow has a chance to come in and get approval of the claim for an executory contract."

under Section 77B would ordinarily be taken without prior bankruptcy proceedings, not *in* them as here. The provision last quoted will, therefore, have very little application in the future; it was designed to remedy existing inequities.

Further indication of Congressional intent to give landlords remedies in then pending bankruptcies, appears from a comparison of the provisions of 77B with the corresponding provisions of Section 63(a), enacted contemporaneously, making landlords' claims under rejected leases provable. Section 63(a) with respect to landlord claims is specifically limited "to estates * * * in which the time for filing such claims has not expired" (63(a)(7)). Section 77B not only contains no such time limitation but specifically provides that such claims *may be proved* if the lease "shall have been rejected * * * in a proceeding pending prior to the institution" of the 77B proceeding.

The decision below is directly contrary to the expressed intent of Congress and has denied these retrospective provisions of 77B substantially the chief effect that they were intended to have.

THE DETAILED PROVISIONS OF SECTION 77B RESPECTING LANDLORDS' CLAIMS PLAINLY MAKE CLAIMS UNDER LEASES A NEW KIND OF BANKRUPTCY CLAIM.

Congress, in the exercise of its bankruptcy power, has created a new class of creditors, not recognized by the substantive law of landlord and tenant and not previously existing in bankruptcy. Section 77B provides at some length, that a person whose lease is rejected in a 77B proceeding, *or has been rejected by a trustee in a prior bankruptcy proceeding,* if injured by such rejection, shall for all purposes of the Act "be deemed to be a creditor" (Section 77B (b)(10)). Then follows the provision limit-

ing the amount of such claims and also the amount of landlord claims under covenants, *i. e.*, claims which have always been recognized under the substantive law of landlord and tenant. This provision reads:

> "The claim of a landlord (1) for injury resulting from rejection of an unexpired lease of real estate *or* (2) for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63(a) of this Act, but shall be limited" etc. (Numerals and italics ours.)

The decision of the Court below nullifies the foregoing provision for the allowance of claims "for injury resulting from rejection of an unexpired lease". It completely disregards the separate classification and alternative manner of describing different types of landlords' claims, as well as the elaborate (and retrospective) provision that "any person injured by" a "rejection shall * * * be deemed to be a creditor".

The "substantive law of landlord and tenant" confines its remedy for loss of future rents after termination, to leases containing appropriate covenants providing for damages or indemnity. Section 77B, being, like the rest of the Bankruptcy Act, a law unto itself, has provided for the allowance of another class of claims, *i. e.*, claims for injury—the pecuniary loss—resulting from the exercise of the right to reject unexpired leases. The provision for the allowance of claims "for damages or indemnity" presupposes a valid and existing claim under lease law. The provision for claims for injury resulting simply from rejection of the lease presupposes merely a financial

loss, thus setting up a strictly 77B claim.[6] But the Court below in this case has read this last group out of the statute.[7]

RE-ENTRY OR SURRENDER AFTER REJECTION DOES NOT BAR A LANDLORD'S CLAIM FOR FUTURE RENT.

Even if the agreements had constituted surrenders, as held below,[8] it by no means follows that these landlords' claims were thereby lost or affected.

After providing for the two classes of landlords' future rent claims, 77B provides that they

> "* * * shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years *next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever*

---

[6] Under the English Bankruptcy Acts (32 and 33 Vict., c. 71, Sec. 23 (1869); 46 and 47 Vict., c. 52, Sec. 55(7) (1883); 4 and 5 Geo. V, c. 59, Sec. 54(8) (1914)), the English Courts hold that a landlord is "injured" by a disclaimer (the equivalent of rejection under 77B) if financially damaged, regardless of whether or not there is a surviving covenant for damages or indemnity. Since the landlord provisions were included in Section 77B very shortly after the decision in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, which refers to the English act at length, it is apparent that the section was patterned on such act. The language of the two is almost identical and Congress must have intended that the same effect be given to the language in 77B as the English Courts gave the corresponding language in the English acts.

[7] *In re Paramount Publix Corp.* (*Madison-Toledo Co.* v. *Paramount Pictures, Inc.*), 85 Fed. (2d) 83, this same Court allowed a claim on a rejected lease which had no covenant for damages or indemnity. In that case, the lease had not been terminated prior to the enactment of the statute. But, as has been seen it is immaterial whether or not the lease has been rejected in a 77B proceeding "or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity, in a proceeding pending prior to the institution" of a 77B proceeding.

[8] Petitioners deny that the agreements constituted surrenders (see footnote 10, *infra*).

> *first occurs,* whether before or after the filing of the petition, *plus unpaid rent accrued* up to such date of *surrender or reentry* * * *"

Landlords' claims under 77B, as previously pointed out, depend only upon a continuing lease liability of the tenant-debtor at the time the lease *is rejected.* In each of the nine claims herein, the leases had been rejected, either expressly or in effect, prior to the execution of the agreements. Since the claims are born of rejection, no subsequent surrender between landlord and tenant could be material.

Furthermore, how could surrender, if such there was, affect the provability of a landlord's future rent claim when the Act itself expressly fixes "the date of surrender" as a determinative factor in computing the *amount* of the claim? Surrender is *contemplated* in proving such amount. Being one of the elements of the measure, it quite obviously cannot be a bar to that which is to be measured. And the surrender referred to in the measure, is one which occurs either "before or after the filing of the petition" (77B (b) (10)).[9]

Surrender is a necessary part of the scheme of 77B. Landlords with rejected leases containing no surviving covenants, in order to maintain claims, would otherwise have to leave their premises idle until the claim was allowed, or conceivably until the 77B pro-

[9] The phrase in the statute is "surrender of the premises". This phrase has been defined in *Gray* v. *Kaufman Dairy & I. C. Co.*, 162 N. Y. 388 (cited by the majority opinion of the Circuit Court of Appeals, 83 Fed. (2d) at p. 205), as follows:

> "It is so well settled as to be almost axiomatic that a *surrender of premises* is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they have both agreed to consider the surrender as made."

ceeding was ultimately closed. If surrender or any similar ending of the term cut off the right to provable claims under the section, it would necessarily cut them off whenever it occurred whether the leases contained surviving covenants or not. Unless those leases were terminated by rejection, surrender or otherwise, landlords could not be given allowed claims, at any stage of the proceedings. It would necessarily remain uncertain until the end of the lease term, whether or not the continuing rights under lease or covenant, would not be prematurely ended by some act or omission of the landlord and hence, the right to a provable claim lost. No such suspense of status is contemplated by 77B, since it grants landlords claims "for all purposes of this section and of the reorganization plan, its *acceptance* and *confirmation* * * *" Those claims must, therefore, be allowed and votable before reorganization. It follows that the statute contemplates not continuing liability but termination.

If further proof of Congressional intent is needed on the point that 77B claims are based on termination and not continuation of lease liability, it is furnished by the provisions of the Bill relative thereto, as it originally passed the House, in contrast to the provisions finally enacted. The House Bill read (H. R. 5884-73rd Cong. 1st Sess., Print of June 2, 1933, p. 10):

> "In case any executory contract *shall be* rejected, the same shall be deemed to have been breached and the holder shall be entitled to file a claim for damages for such breach and such claim may be allowed *provided such contract shall not have been terminated by forfeiture, reentry, or otherwise.*"

The elimination of the concluding clause and the substitution of the present provision speak for themselves.

In sum, petitioners here are asserting exactly the claims which Congress provided they should have under Section 77B. Congress defined the claims which it proposed to make allowable. In providing for these claims, rejection and surrender were obviously contemplated. If the trustee was not empowered to terminate the lease with or without the consent of the landlord, the latter might indefinitely delay the reorganization of the debtor by refusing to either re-enter or accept surrender, thus keeping the lease in force, despite rejection. That power to terminate granted, the landlord is naturally and necessarily given a compensatory claim. And a landlord "injured" by rejection in a prior bankruptcy or equity receivership, whether before or after the passage of Section 77B, is expressly accorded exactly the same standing as one who loses his tenant by rejection through the new means of corporate reorganization set up by the legislation.

POINT II.

The qualification riders attached to the assignment agreements reserved the petitioners' claims herein, even if those agreements be construed as surrenders.

Assuming that the agreements did constitute surrenders,[10] petitioners' claims were nevertheless preserved by virtue of the typewritten riders annexed thereto. The proposition that rights may be saved from the operation of surrenders by agreement, has not been disputed. Obviously, the only possible reason for the riders herein was to preserve rights. The majority of the Circuit Court of Appeals apparently conceived of the assignment agreements as two dis-

[10] One of the chief advantages held out by the trustee to induce landlords herein to enter into the assignment agreements with the bankrupt and the trustee-in-bankruptcy was the preservation for the landlords of subleases entered into by the bankrupt (R. 9-16). If, as the majority of the Circuit Court of Appeals held, these agreements constituted surrenders, the estates of the tenant and landlord merged and the subleases were wiped out. Whether or not an agreement operates as a surrender is a matter of intention. Since an important purpose of the agreements was to preserve the subleases, which would be destroyed by surrender, the agreements cannot be construed as agreements of surrender. Almost the exact point here involved has been passed upon in a decision post-dating the decision below. The New York Court of Appeals in *Metropolitan Life Ins. Co.* v. *Hellinger*, 272 N. Y. 24, held that where an agreement intends to preserve subleases it will not be interpreted as contemplating a merger, *i. e.*, a surrender.

> "Per Curiam. We do not reach the question of what defendant's obligations, if any, would have been had there been a mere technical surrender of the master lease and nothing more. The terms of the agreement of September 13, 1930, clearly and as matter of law disclose an intent that the subleases were to be kept alive and that the owner should stand in the shoes of the defendant's immediate lessor. In effect there was an assignment of the subleases. Any narrower interpretation would be inequitable. Under such circumstances the doctrine of merger is inapplicable. (*Beal* v. *Boston Car Spring Co.*, 125 Mass. 157; *Appleton* v. *Ames*, 150 Mass. 34; *cf.* 13 Columbia Law Rev. 245.)"

tinct instruments, one constituting a surrender, the other a release. Since they held the agreements operated as surrenders, they further held no claims with respect to future rent survived to be barred by the releases or to be preserved by the modifying provisions of the riders. By this reasoning, since surrender is a matter of intention, there is attributed to petitioners the simultaneously inconsistent purposes of surrendering all their rights and then, by the riders, of preserving the rights which they had just given up.

Insofar as there is a conflict between the rider and the other parts of the agreement, the rider must prevail. The typewritten material takes precedence over the printed form. There is a presumption against surrender of rights. The writings must be construed against the writer, which in this case was the trustee.

Judge A. N. Hand, who held with his brothers that the agreements constituted surrenders, nevertheless recognized that the document was a single agreement and refused to subscribe to the statement of the majority that the riders "did not 'limit in any way the effect of the agreements for lease modifications' ". He said (83 Fed. (2d) 202, 207):

> "It is said in the opinion that the leased real estate was 'surrendered to and accepted by the landlords without any reservation of rights under the leases against the lessee. * * *' But that, I think, is not at all what was done. Not only did the statement in the rider that there was no 'waiver by the Landlord of the right to prove against the bankrupt estate any provable claim' limit the general release, but the rider cannot have the meaning intended unless it be taken to reserve against the bankrupt's estate any claims which existed but for the surrender and general release."

Certain it is that the riders were intended to reserve some thing.[11] The only question is whether the reservations they made were sufficiently broad to include the future rent claims presented in this 77B proceeding.

That the reservations are sufficiently broad to include 77B claims is apparent from the language of the riders. The typical form of rider reserves the right (numerals in parentheses ours):

> "To prove (1) against the Bankrupt Estate (2) any provable claims (3) to which the Bankruptcy Court may adjudge the landlord is entitled."

In respect to all three characteristics, the 77B claims filed by the nine petitioners herein, come squarely within the language used.

1. The "Bankrupt Estate" is simply that property which formerly belonged to the bankrupt and came into the custody of the Bankruptcy Court where it remains.

2. Section 77B(b)(10) expressly makes claims for future rent "provable claims".

3. A 77B Court is a "Bankruptcy Court" by express provision of 77A. Here the identical Bankruptcy Court sat in the 77B and the prior bankruptcy proceedings.

Thus these future rent claims in this proceeding under the Bankruptcy Act fit perfectly the rider's description of the claims reserved.

1. The claims for future rent filed in this proceeding are claims against "the Bankrupt Estate".

---

[11] In the briefs below it was said that the claims were not "reserved" as the riders in terms provide for the non-waiver of the claims. This, on its face, is a distinction without a difference. What one does not waive, one retains or reserves.

"The bankrupt estate" has been judicially defined to mean "the unencumbered assets generally of a bankrupt, properly administerable in bankruptcy, as distinguished from property of the bankrupt dedicated by law to the payment of a particular obligation or upon which there is a subsequent lien". *In re Menzies,* 60 Fed. (2d) 1064, 1067; *In re Rauch,* 226 Fed. 982, 984, affd. *sub nom Lott* v. *Salsbury,* 237 Fed. 191.

The 77B definition of "creditors" includes "all holders of claims of whatever character against the debtor *or its property* * * *" The claims filed in the 77B proceedings by the petitioners are claims against the erstwhile "Bankrupt Estate". At the date of the agreements, this body of assets had already vested in the bankruptcy trustee. Thereafter, upon approval of the 77B petition herein, these assets, as an entity, went over intact to the 77B trustee. The *res* remained identical.[12] Section 77B(p) provides

---

[12] How far this is so, may be seen from the order of the District Court dated June 14, 1934, whereby the newly appointed Trustee in the 77B proceeding was authorized to take immediate possession of the "business, assets and properties of the Debtor and of the Bankruptcy Trustee", the same "being herein collectively referred to as the Debtor's estate". As the Debtor had some years previously been divested of all of its property by the filing of the bankruptcy petition, all that passed under the order were the assets held by the Trustee in bankruptcy, *i. e.,* the "Bankrupt Estate". The identity of the bankrupt's and the Debtor's estate was so complete that the said order went on to provide:

> "* * * the Trustee being authorized to continue the books of account of the Bankruptcy Trustee without division, all operations beginning with the opening of business on the date of this order being deemed to be for the account of the Trustee."

By further provisions of said order, the Trustee in 77B by its mere qualification as such, was deemed to have assumed all obligations of the Bankruptcy Trustee and automatically to have succeeded to all authority vested in the Bankruptcy Trustee by prior orders.

that 77B proceedings "may be taken in (pending) proceedings in bankruptcy". That is just what was done by United Cigar Stores Company of America. The assets are, therefore, still in the original bankruptcy proceeding in which the claims were reserved.

2. The proposition that claims for future rent are "provable claims" in bankruptcy proceedings under Section 77B will scarcely be disputed. See Section 77B(b). That petitioners here at the time the agreements were made had claims of the kind made provable by Section 77B has already been demonstrated in Point I, *supra*.

3. The "Bankruptcy Court" at the time of the assignment agreements was the United States District Court for the Southern District of New York. These 77B proceedings are pending in the same Court, which, in such 77B proceedings, sits as a Bankruptcy Court, expressly so constituted by the Bankruptcy Act, Section 77A, which provides:

> "In addition to the jurisdiction exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, *courts of bankruptcy* shall exercise original jurisdiction in proceedings for the relief of debtors as provided in Section 77B of this Act."

77B proceedings are "proceedings in bankruptcy". (*Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160, 165.)[13]

This proceeding was necessarily instituted under Section 77B(p) and was therefore "taken in (the

---

[13] To the same effect *In re Commonwealth Bond Corporation*, 77 Fed. (2d) 308 at 309; *In re Island Park Associates*, 77 Fed. (2d) 334 at 334; in which the Circuit Court of Appeals, below, refers to a "debtor" filing "its petition in bankruptcy under Section 77B".

then pending) proceedings in bankruptcy". We are therefore still in the original bankruptcy proceeding in which these claims were expressly and admittedly reserved. *Vitagraph, Inc.* v. *St. Louis Properties Corp.*, 77 Fed. (2d) 590, 592-593. As was said by Judge Mack in *In re Associated Gas & Electric Co.*, 11 Fed. Supp. 359 at 364, after referring to part of one of the House Reports on Section 77B. "The indication here, too, is that *section 77B is but an added step in bankruptcy rather than an organically new legal proceeding.*"

Though reorganization, instead of liquidation, may be the objective and result of the present form of this proceeding, the *forum* and the *proceeding itself* has been the same throughout, as much so as would have been the case if, before the enactment of Section 77B, the bankrupt, under the old statute, had proposed a composition instead of permitting the assets to go to liquidation. (See *Campbell* v. *Alleghany Corp.*, 75 Fed. (2d) 947 at 953.)

Thus the claims for rent made by the petitioners in the 77B proceedings are "provable claims" made against the very assets against which they were reserved, *i. e.*, the "Bankrupt Estate", in the same Bankruptcy Court, all as provided in the reservation rider.

Not only are the riders apt in phraseology to include 77B claims for rent, but it seems no longer open to doubt that the parties had future rent claims in mind when drafting and adopting the reservation riders. The Special Master so held (R. 330, 332) and so did the majority of the Circuit Court of Appeals (R. 396). As Judge Hand points out in his dissent, the trustee and the debenture bondholders conceded

the same thing in their briefs below[14] (83 Fed. (2d) 202, 207).

Although all agree that the reservation riders included future rent claims, they say that the rider contemplated that future rent claims were only intended to be provable, if they were held to be so by future judicial decision and not if they were made provable by future legislation.

---

[14] That future rent claims were contemplated is established by the printed instructions of the trustee to its field agents and the rider which was used in the Claim of Morgan, one of the companion claims argued together with these claims below. (See record on certiorari, p. 394.) The printed instructions advised the trustee's field agents that the riders might be inserted where requested. The last sentence with respect to the rider reads (R. 19):

> "You should note that this additional paragraph provides that claims for rent under the lease or damages in respect thereof are not deemed provable claims."

In the Morgan claim the rider reads in the typical form but has added thereto the sentence:

> "In no event shall provable claims be deemed to include any claims for rent under the lease or for damages in respect thereof."

In other words, it is quite clear that the rider as drafted by the trustee was in the typical form herein set out *plus* the last sentence of the Morgan rider above quoted. *It was stricken out of the riders in the case of the petitioners* thus emphasizing their intent (recognized even by the Circuit Court of Appeals) that future rent claims be reserved by the riders.

So again ~~In fact,~~ where the trustee intended to exclude future rent claims from the general provisions of the rider, it so stated in unmistakable terms. See claim No. 5241, Detroit Trust Co. etc. record on certiorari, page 432. The qualifications there provided:

> "But nothing in this agreement contained shall be deemed a waiver by the landlord of the right to prove against the Bankrupt Estate any provable claims for rent or taxes accruing prior to August 29, 1932 * * *."

The majority of the Circuit Court of Appeals said, in denying rehearing[15] (R. 396):

> "The parties were contracting in view of the then existing uncertainty as to the provability in bankruptcy of claims for future rent which was not dispelled until some two years later by the decision in *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320, 54 S. Ct. 385, 78 L. Ed. 824."

In other words, the majority of the Court says that landlords, knowingly and deliberately contracting with respect to rent claims and aware of the then existing uncertainties surrounding such claims, intended to have such claims only at the hands of the Court and did not want them at the hands of the legislature! In fact, at the time the agreements were signed (between October 19, 1932 and December 3, 1932) the *Manhattan Properties* case was an obscure litigation unknown to the public on which the Circuit Court of Appeals did not speak until months afterwards, and the always remote possibility that this Court would grant *certiorari* was not even a topic for speculation. *In re Roth & Appel*, 181 Fed. 667, had been law for twenty-two years and there was no reason to suppose that its holding would be judicially changed. On the other hand, as demonstrated in Appendix A to this brief, Congress was, at the time of the signing of the agreements, and had been for long theretofore, actively engaged in widely publicized

---

[15] On petition for rehearing, it was pointed out that in the Rubel and Livingston claims (R. 383-386), the riders were not merely limitations of the releases but by their express terms went to the whole agreement and therefore were not ruled by the reasoning of the majority opinion with respect to surrenders. The majority agreed that this was so but still barred the claims on the ground that the riders did not include 77B claims for rent if made provable by future legislation as distinct from future judicial decision.

consideration of amendments of the Bankruptcy Act which, it was generally believed, would include relief for landlord creditors. It is far more probable that when the reservations were made, the hope was for legislative, rather than judicial relief. As Judge Hand said in his dissent (83 Fed. (2d) at 207):

> "But remedial legislation as to such claims was already before Congress when the agreements were made, and the riders nowhere limited claims which might be proved to those that the law then allowed. The rider specified 'any provable claims to which the Bankruptcy Court may adjudge the landlord is entitled'. This, I think, embraces any claims which might then be provable or which might become provable through subsequent legislation * * * *I can see no distinction between a provability arising from legislative sanction and provability arising from judicial decision.*"

There is not a word in the Record herein to indicate that the claims for future rent reserved by the riders were intended to be limited to provability arising through judicial, rather than legislative decision.

The only testimony on the subject is to the direct contrary. The meaning of the language of the typical rider was discussed between the parties, in one of the claims herein. Max Petacque, Esq., the attorney for Simon Lorch, who negotiated the assignment agreement with the trustee's representative and the trustee's counsel, on behalf of that claimant, testified as follows (R. 307):

> "Mr. Faust and Mr. Wolff, working rather closely together, I could not possibly identify which said which, but between the two of them, one or the other said that the landlords, after

all, did not have any claims against the estate and the only claim he could possibly have was a claim for taxes and they were willing to protect us on the taxes but we ought to waive any other sort of a claim inasmuch as I, as a lawyer, they said, knew that the landlords could have no other claims. I said to them that early in my practice of the law I made a number of mistakes by trying to guess all the answers to a situation and I was not going to try to guess all the answers to this situation, a situation so highly involved, knowing there were all sorts of allegations of fraud in connection with the filing of this proceeding, I did not know what was going to happen, whether the company was going to go through with it or whether the company was going to reorganize and *I wanted to reserve the right to file any claims which might arise depending upon future circumstances. We had a very considerable discussion over this matter and we finally agreed upon the clause such as appears in the instrument.*"

The Mr. Faust referred to in the above quotation was Chicago counsel to the trustee in these landlord negotiations. Mr. Wolff was the trustee's representative in Chicago in negotiating the agreement in question. The only answer made below by respondents to this very explicit testimony consisted of slighting remarks in their briefs, casting doubt on Mr. Petacque's veracity. However, neither Mr. Faust nor Mr. Wolff was called to the witness stand to challenge or contradict Mr. Petacque's testimony at the time it was given, though both were available and Mr. Wolff testified on other matters.

All that the Circuit Court of Appeals offers in support of its view (R. 396-7) is the unsupported statement that had rights under future legislation

been intended to be reserved, that intent should have been expressly set forth in the rider. Since the writing was the trustee's, it would be more to the point to say that, had it been intended to exclude future legislation, that exception should have been incorporated. In view of the unfortunate narrowing of generalities resulting from specification, the landlords were probably well advised to rest on the sweeping language which was used. Further, since the trustee was apparently admitting that the broad terms of the rider were intended to mean what they said (*vide*, Petaeque, *supra*), there was no occasion for specification.

Much was said in briefs below concerning the effect of the balance of the typical rider, which provides, after the language hereinabove quoted

> "* * * but this shall not be deemed to render any claim a provable claim which is not otherwise such or relieve the landlord from the necessity of proving and obtaining the allowance of any such claim or preclude the trustee from contesting such proof or allowance."

Obviously, the clause was one inserted to make certain that the existence of the rider would not, by the very fact of its insertion, be deemed a waiver of defenses, when claims were thereafter asserted. Each claim had to be proved on its own merits, not through an inadvertent admission by the trustee. This was all that was meant. That this is so, is demonstrated by the printed instructions sent by the trustee to its field agents, which, with reference to the riders, said:

> "The purpose of this additional paragraph is to give the landlord a right to prove against the bankrupt estate any provable claims, if he has

any, *but it does not, of course, relieve the landlord from the necessity of proving and obtaining the allowance of such claims or preclude the trustee from contesting such proof and allowance*" (R. 19).

It was also argued below that the word "*is*" in the phrase of the riders "which the Bankruptcy Court may adjudge the landlord *is* entitled" limits the riders to then provable claims. Obviously "is entitled" is assimilated to "may adjudge", which even the trustee, in its brief below, said connotes futurity.

The interpretation of the riders given by the Circuit Court of Appeals is without support from the record, flies in the face of the only testimony on the subject, violates all the usual canons of construction and contradicts the reasonable probabilities of what would have been in the minds of parties contracting in the then situation with a view to preserving future rent claims.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed, with instructions to allow the petitioners' claims in the amount of such loss as the petitioners have suffered by reason of rejection of their leases, subject to the limitations on the amount of claims set forth in Section 77B.

Respectfully submitted,

SUSAN BRANDEIS,
Counsel for Petitioners.

MURRAY C. BERNAYS,
GILBERT, DIAMOND & BRANDEIS,
Of Counsel.